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By-Carber, Lee O.

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As a product of judicial rulings on the legality of acts of educational authorities and on the constitutionality of educational legislation, the common law authoritatively constrains the actions of school officials. Courts have recently delineated general boundaries in two important areas of school law: (1) Tort liability of school districts, and (2) civil liberties of pupils. The school district's traditional immunity to tort liability and the ability of school officials to enact and enforce reasonable rules and regulations governing the conduct of pupils have been redefined by judicial decisions. Although these decisions have left some specific questions unanswered, school administrators must understand the principles of law that the courts have enunciated, and attempt to keep abreast of the changes in school law likely to be announced by the courts in the near future. (JH)

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RESEARCH AND INFORMATION SERVICES FOR EDUCATION
443 SOUTH GULPH ROAD
KING OF PRUSSIA/PENNSYLVANIA 19406
215 — 265-5967

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Research Memo No. 2

Recent Innovations In Judicial Pronouncements Relating to Education

by DR. LEE O. GARBER

Emeritus Professor of Education, University of Pennsylvania
Professor of Education, Illinois State University

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RESEARCH MEMO #2

RECENT INNOVATIONS IN JUDICIAL PRONOUNCEMENTS RELATING TO EDUCATION

by Dr. Lee O. Garber

Emeritus Professor of Education, University of Pennsylvania
Professor of Education, Illinois State University

(An address presented to conference sponsored by R.I.S.E., 4/26/68)

This morning I want to discuss with you some recent changes and novel pronouncements in the ruling of courts as they arrive at decisions concerning problems of an educational nature. This is particularly apropos at a meeting sponsored by an organization whose purpose is to encourage research and to disseminate the findings of research.

In the first place, it must be remembered that not all law is made by the legislative branch of government. The judicial branch is also the source of law. The courts, in ruling on the legality of acts of educational authorities and the constitutionality of educational legislation, are constantly enunciating general principles of law that, in the absence of statutes to the contrary, are just as binding on school authorities and the public as are statutes resulting from the deliberations of the legislative arm of government.

To the uninitiated this is sometimes disturbing, particularly when courts may be in disagreement or when one court may even reverse itself. School authorities, accustomed to think of legislature enactments as the sole source of law, often seem to feel that the law should be static and changeless. But the legislature changes its mind, and amends or even repeals particular laws from time to time. So, why should not the courts? As the thinking of our judicial officials changes, as does that of the public due to changes in economic, social, and political conditions, what is more natural than that courts should arrive at new solutions or answers as they attempt to apply principles of equity, justice, and fair dealing? In fact, the strength of our judicial system stems largely from the fact that change is possible.

Change is not only possible but frequently desirable, even essential. In this connection, a pronouncement of the New Jersey Superior Court is especially significant.[1]

> It is to the credit and the glory of the common law that it has always had within itself the seed of change, keeping pace with the march of the years and the advance of thought. Wherever it has lagged it has been because of the conservatism which

[1] **A. P. Smith Mfg. Co. v. Barlow, 97 A.** (2d) 186 (N. J.).

> was hesitant to recognize the changing times and the need to revise the law's precedents. But always and eventually the common law caught up with the times and molded itself to the newer needs for the public good . . .
>
> . . . Emancipation from earlier constricting attitudes and holdings is part of the process of judicial growth and public service.

Similar is the following statement from a decision by the Supreme Court of Iowa.[2]

> It is true that the law should not be, and is not, static; it should grow and develop with economic, political, and cultural conditions which surround it. This, however, does not mean that it should not generally be definite and settled. The rule of *stare decisis* has its basis in something stronger than the thought that the courts should follow hide-bound precedent without regard to justice or equity. It derives from the consideration that when the courts have fully and fairly considered a proposition and have decided it, only the most pressing reasons should require, or in fact even permit, an opposite holding. Lawyers and clients have a right to know what the law is, and to order their affairs accordingly. Some cynic has said that "consistency is the vice of small minds."

As the court said, "Lawyers and their clients (in this case, school officials) have a right to know what the law is . . ." Administrators can very easily determine for themselves what the law, as enacted by the legislature, is. They need only read the School Code. Not so, however, in determining what legal principles the courts have established. These principles are generally referred to as the common law — more precisely judge-made law. To discover them requires such detailed research, analysis, and study that the average administrator cannot afford the time required. Here is where a research agency, such as the one sponsoring this meeting, comes into the picture. It can and, I might add, *should* do at least three things: (1) it should provide answers to specific legal questions, within reasonable limits; (2) it should keep administrators aware of research undertaken in this field; and (3) it should disseminate information of a legal nature that is of general interest. In acting in the third capacity, it has called this meeting today.

With this introduction, I wish to proceed to the main task before me. As indicated, ,judge-made law is changing. It is with this that I am prmarily concerned. Time does not permit me to consider all changes that have recently taken place, that are currently taking place, and that are, it appears, destined to take place in the near future. I shall confine myself largely to two major changes that all school administrators in Pennsylvania should be aware of: (1) changes in the law of tort liability of school districts, and (2) changes in the law as it relates to the rights of pupils.

First, without discussing them, I want to mention two generalizations, not necessarily related to my subject, that I feel are important.

[2] **Swan Lake Consolidated School District v. Consolidated School District of Dolliver, 58 N. W. (2d) 349 (la.).**

First, it should be noted that plaintiffs in growing numbers are basing their actions on constitutional ground and, consequently, federal courts are more and more being called upon to decide questions that were formerly decided in the arenas of state courts. This is the result of society's increased concern with the subject of individual rights and the federal government's preoccupation with and interest in the field of education. A second generalization I would like to make is that litigation in the field of segregation and integration is moving from the field of segregation and integration of pupils to that of teachers. Courts are taking the position that the proscription against the assignment of pupils on a racial basis is equally applicable to the employment and assignment of teachers.

With respect to the principle of tort immunity, it must first be recalled that it has long been the general rule in this country that school districts, which are arms or agencies of the state, are covered by the state's traditional immunity from liability. That is, school districts will not be held liable in damages for injuries resulting from the negligent acts of their officers, agents, or employees. In 1959 the Supreme Court of Illinois saw fit to declare this principle of law outmoded; in the now famous **Molitor** case[3], it held a school district liable and stated that this would now be *its* position on all such actions that might arise in the future. This was the first time a state court had taken upon itself the responsibility for overthrowing this long-accepted legal principle, although individual judges in several states, writing dissenting opinions, had taken the position that the time had come to abrogate this rule. At that time, it was freely predicted that, following the example of Illinois' highest court, the courts of many other states would "fall into line." (In the nine years following this decision, however, the highest courts of only four or five states have done so.) Some of us in Pennsylvania at that time felt certain that the Supreme Court of Pennsylvania would soon change its thinking, but as yet it has not done so. In Pennsylvania the courts have always followed a modification of the immunity doctrine. They have held school districts immune only when the injury complained of grew out of the performance of a governmental function, but liable if the function was proprietary in nature. Even so, in those cases before the Supreme Court in which the question of tort liability was at issue, there have been, for 10 or 15 years at least, dissenting opinions arguing that the time had come for its abrogation. Still, the majority has refused to take this step. I might say that Judge Musmanno has consistently attacked the immunity doctrine in his minority opinions, frequently vitriolic in character. As late as approximately one year ago he had the following to say on this subject:

> The day will come when this Court can no longer escape answering the question as to whether school districts are liable in tort . . .
>
> There is adequate law on the books to guide us in rendering a decision founded on the natural and eternal principles of justice. I see no reason for postponing the inevitable.[4]

[3] **Molitor v. Kaneland Community School District,** 182 N.E. (2d) 145 (111).

[4] **Dillon v. York City School District,** 220 A. (2d) 896 (Pa.).

Because the courts of Pennsylvania have already adopted a modified doctrine of immunity, because Judge Musmanno has led the fight for the abrogation of the immunity doctrine as it relates to public schools, and because the majority of the court did "go along" with Judge Musmanno a few years ago in a decision he wrote that had the effect of abrogating the common-law rule of immunity with respect to charitable hospitals (at least as far as paying patients are concerned), it has been felt that it is now only a matter of time until the court will abrogate the immunity rule as it applies to school districts. Although it is never safe to predict what a court will do at some future date, I believe that the time has come in Pennsylvania when school boards and school administrators would do well to proceed as though the common-law doctrine afforded them no protection. So much for changes, or I should probably say, possible changes in the law of tort immunity as it relates to school districts in Pennsylvania.

Now let us briefly consider the law as it relates to the rights of pupils. While courts have long taken the position that school boards may enact and enforce reasonable rules and regulations governing the conduct of pupils, little litigation has focused on the subject of the rights of pupils when it comes to the enforcement of such rules. Until recently, it appears that school officials have acted upon the assumption that the safeguards of individual rights guaranteed by the Constitution of the United States were placed there solely for the protection of adults and have given little, if any, attention to the procedures they have employed in enforcing rules and regulations against juvenile offenders. But that day, as we shall see, appears to have passed. Mr. Justice Fortas, speaking for the United States Supreme Court, recently said: ". . . neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[5] In so holding he was in agreement with Mr. Justice Douglas who, in speaking for the same Court, had said earlier: "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."[6] While these decisions were rendered in cases involving the question of the constitutionality of certain court procedures followed in dealing with juveniles and did not consider the relationship of the juvenile and the school, they are, standing alone, sufficient to put public-school administrators on notice that the courts will not look kindly on proceedings, whether conducted by courts or school officials, that deny due process to juveniles accused of violating rules and regulations, who, if found guilty, would be subject to discipline or punishment of one sort or another. Administrators are warned to concern themselves as much with the procedures employed in judging pupil conduct as with the punishment meted out, if they desire to avoid legal difficulty.

Let us now consider what the courts have had to say about these procedures. First, I must call your attention to the fact that there is a paucity of cases from which we can draw inferences. In fact there is only one case that deals directly with the pupil's right to due process in a hearing before a school board. However, several others, dealing with the rights of juveniles in juvenile court, provide us with some prin-

[5] **Application of Gault, 87 S. Ct. 1428** (originating in Ariz.)

[6] **Haley v. State of Ohio, 332 U. S. 596** (originating in Ohio).

ciples that appear to have application to pupil hearings. One of these,[7] decided just a little over a year ago, by the United States Supreme Court, while decided on a technicality, gives us some hint as to how the Court might rule if faced directly with the question of the rights of juveniles at school board hearings. At least it provides evidence of the fact that the Court is showing some concern for the due-process rights of children. It examined juvenile court proceedings rather carefully, considered the philosophy or theory back of the establishment of juvenile courts and expressed concern over some of their procedures. While it appeared to be critical of some procedures it carefully avoided going so far as to hold that the child offender is entitled to all the protection accorded to adults in criminal trials. To make its position clear, it said that in this case it would not "accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which . . . (plaintiff) was tried must be applied in juvenile court proceedings concerned with the allegations of law violation." This decision was generally interpreted as but a first step, and it was predicted that the Court would eventually have more to say on the subject.

This was bolstered within the year by another juvenile court case—the **Gault**[8] case — which came out of Arizona, and was decided by the same Court. Here the Court held that in a juvenile court proceeding the juvenile and his parents are entitled to written notice of the charges against him "sufficiently in advance of the hearing to permit preparation." It also held that the juvenile was entitled to the assistance of counsel "at every step in the procedings against him." In this decision the Court seems to have come even closer to the problem in which we are interested, the rights of the child during proceedings by school officials. As yet this question has not been before the United States Supreme Court. However, a month before this Court rendered its decision in the **Gault** case just mentioned, a federal district court in New York did face this question squarely. While its decision must not be considered final, it is worth our careful attention.

This case, the **Madera**[9] case, was an action against the Board of Education of the City of New York, brought by a pupil and his parents challenging the legality of a board rule which prohibited a pupil from being accompanied by an attorney at a "guidance conference." The pupil had been suspended by his principal, following which his parents had been notified that a conference would be held in the district superintendent's office regarding the suspension of the boy, and they were informed that they were to be present. They secured an attorney who contacted the district superintendent to tell him that he (the attorney) would be present at the hearing or conference, only to be informed that school board rules forbade his attendance. The conference was referred to as a "guidance conference," and its purpose was that of "providing an opportunity for parents, teachers, counselors, supervisors, et al., to plan educationally for the benefit of the child." Plaintiffs sought a temporary restraining order postponing the holding of the conference. One of their claims was that the presence of an attorney was essential because facts adduced at the conference might later be used against

7 **Kent v. United States, 383 U. S. 541** (originating in D. C.)

8 **Application of Gault,** 87 S. Ct. 1428, (originating in Ariz.)

9 **Madera v. Board of Education,** 267 F. Sup. 316, (originating in N. Y.)

the boy at a Family Court hearing on juvenile delinquency. Plaintiffs also contended that the hearing procedings could result in denying the boy the "right" to attend the public schools granted him by the Constitution and Education Law of the State of New York, without due process of law guaranteed by the Fourteenth Amendment." The court, agreeing with plaintiffs, held that the board rule denying a pupil the right to have an attorney present at a hearing or conference, which could result in placing in jeopardy the child's liberty and right to attend a public school and which could place his parents in jeopardy of being proceeded against in a child neglect action, was not valid. It said: "Proceedings which involve the loss of liberty and the loss of education are of 'critical importance' both to the persons involved and to our system of justice. Any such proceedings must meet federal constitutional standards of fairness." With respect to suspension and expulsion, the court pointed out that fairness requires that a student not be expelled or suspended without a hearing following notice. Finally, it laid down some general criteria as to what constitutes fairness at a legal hearing. Then it said: "This court does not by this decision say that a full judicial hearing with cross-examination of child witnesses and strict application of the rules of evidence is required. There should be latitude for the board in conducting such a hearing." Now, I must add that in December this decision was reversed by a United States Court of Appeals.[10] The court based its decision on the fact that there are different kinds of hearings and since the guidance hearing did not put the child in jeopardy of losing any personal rights, he could not demand that an attorney be present. It stated that the hearing was for guidance purposes only and evidence could not later be used in court. So, while reversing that decision, it did not apparently vitiate the principles enunciated by the lower court.

As stated earlier, the **Madera** case is the only case in which the courts have commented on the rights of a pupil at a hearing before the school board. In New York, however, the Commissioner of Education, authorized by statute to hear appeals from certain board proceedings, has also ruled on this question.[11] While his decision is not a court decision, it is accepted as law until overruled by the courts. In this case, the Commissioner, relying largely upon the **Madera** case, held that "administrative officers may not unreasonably infringe upon rights which, had the minor been of age, would have been protected by safeguards in the form of a right to a full hearing with representation by counsel." The point at issue was the right of a board of education to suspend or expel a boy from school without first giving the boy the right to present his side of the case. The board admitted that neither the boy nor his parents were given formal notice of the expulsion and that the boy was neither offered nor given a hearing. Ordering the board to reinstate the boy pending a hearing to determine whether he actually committed the offense with which he was charged, and ordering the board to permit the boy to be represented by counsel at such a hearing, the Commissioner said: "Being a minor, the pupil is entitled to be questioned by the local authorities in the presence of his parents, and at the parents' option, his attorney who in turn must be given the opportunity to question the school personnel involved."

[10] **Madera v. Board of Education, 386 F. (2d) 778 (originating in N. Y.).**

[11] **Matter of Cuffee, 7 Ed. Dept. Rep.—(N. Y.).**

The cases I have just commented upon answer some questions but in turn raise additional questions. They make clear that the juvenile—the student — must be accorded due process of law in those instances where his individual or personal rights are concerned. However, they raise the question of what are the pupil's rights that cannot be denied him without due process. They indicate that the child has a right to an education even though, in the past, it was not uncommon for courts to say that the child has no right to an education, that education is a privilege rather than a right. We might ask, does one enrolled in a public school have a right to participate in extracurricular activities, a right that cannot be taken from him without due process? Does a pupil have a right to associate with other pupils in any kind of organization that he sees fit to join, for instance, does he have a right to become a member of a secret fraternity? Is this a right that the board may not infringe upon? These are just a few questions that come to mind. The answers are not yet available, and they will not be until the courts have had the opportunity to rule on the questions involved. Until then, administrators must understand the principles of law that the courts have enunciated, and they must be careful not to violate them. (In time the law will be clarified so that administrators can operate in a climate where more certainty prevails.) In the meantime, administrators should attempt to keep abreast of changes in the law as they are announced by the courts. It is in assisting them to do so that organizations like R.I.S.E. can make a real contribution.